Appendix

United States Court of Appeals
For the Ninth Circuit

Carl H. Root, Appellant, vs. United States of America, Appellee.	No. 17,011 Aug. 9, 1961

Appeal from the United States District Court for the Northern District of California
Southern Division

Before: Hamley and Merrill, Circuit Judges, and Foley, District Judge

Foley, District Judge:

This is an appeal from a summary judgment entered June 21, 1960, on motion of the defendant whereby it was "ordered, adjudged and decreed that plaintiff take nothing and that the action be, and is hereby, dismissed on the merits, each party to bear its own costs."

The subject matter of this controversy is disclosed by appellant's response to requests for admissions as follows:

> "To: Defendant United States of America.
>
> "This document is made out to approve of the various Exhibits requested to comply with rule 36 of the Federal rules of Civil Procedure."

In Paragraphs 1 to 6, inclusive, of appellant's response to request for admissions, appellant admits that Exhibits A, B, C, D, E and F, attached to the request for admissions, are true, correct and complete copies of claims for refund for the calendar years 1951, 1952, 1953, 1954, 1955, and 1956. The remaining paragraphs of the admissions are:

> "7. I agree that the originals of exhibits A through F, inclusive, were filed with the District Director of Internal Revenue, Detroit, Michigan, on May 13, 1957.
>
> "8. I agree that my federal income tax return for the calendar year 1957 was filed on or after February 28, 1958.
>
> "9. I agree that the $5,000 theft loss alleged in Exhibits A through F attached to request for admissions is based upon the following:
>
> "a. On October 2, 1950, I sold my interest in a motel located near Detroit, Michigan, to a party named Gonek, the purchase price of $35,000 being represented by seven unsecured promissory notes of $5,000 each signed by the said Gonek. The first of these notes was due on October 2, 1951, and the remainder due on October 2 of each successive year thereafter.
>
> "b. I agree with b. That within one month after the first note became due and was not paid, I discovered that Gonek had sold the motel to another person and had left the Detroit area, and that I had lost any and all interest in the motel.
>
> "c. After investigating, I determined that Gonek's promissory notes were worthless and uncollectible.

"d. I agree that the $5,000 a year theft loss claimed for the years 1951 through 1957, inclusive, is based upon the fact that in each of those years one of Gonek's promissory notes became due and was not paid.

"10. I agree that I claimed and/or were allowed a deduction for a non-business bad debt of $1,000 on my federal income tax returns for 1951, 1952, 1953, 1954, 1955, 1956 and 1957 by reason of the non-payment of Gonek's promissory notes."

Applicable portions of § 23 of the Internal Revenue Code of 1939, 26 U.S.C.A., are:

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

* * *

"(e) Losses by individuals. In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—* * *

"(3) of property not connected with the trade or business, if the loss arises from * * * theft."

It does not appear from the record that appellant made or claimed deductions for theft loss in his computation of net income in any of his income tax returns for the years 1951 through 1956. After having been allowed a $1,000 deduction for non-business bad debt on his federal income tax returns for each of the years 1951 through 1957, appellant, on May 13, 1957, filed claims requesting refund of a part of his income taxes paid for the years 1951 through 1956 on the

ground that he was entitled to a theft loss deduction of $5,000 as each of Gonek's $5,000 notes matured and was not paid. The claimed theft loss was discovered in 1951 when appellant found that he had been deprived of any interest in the motel without payment. Here the Government does not insist as it did in *Alison v. United States,* 344 U.S. 167, that the alleged theft loss should have been taken as a deduction in the year in which it occurred though discovered afterward, but contends that plaintiff's claims for refund, filed May 13, 1957, years after the time that appellant admits he discovered that he had lost all of his interest in the motel, were untimely and cannot support this action.

Appellant's claims for refund, the originals of Exhibits A to F attached to request for admissions, having been filed on May 13, 1957, more than three years after he could have claimed his theft loss deduction on his 1951 return which was due March 15, 1952, were not filed within the period of time prescribed by 26 U.S.C.A. § 322, Internal Revenue Code 1939. Said section and subsequent amendments thereto provide that a claim for refund must be filed within three years from the time the return was filed or within two years from the time the tax was paid. In *Hagan v. United States,* 9 Cir., 239 F.2d 141, 143, this Court stated:

> "Under the Internal Revenue Code of 1939, which is applicable here, a claim for refund must be filed within three years from the time the return was filed, or within two years from the time the tax was paid. The claims for refund filed on

> September 6, 1952, with respect to returns filed and taxes paid on March 15, 1946, and March 15, 1947, were therefore barred by this statute of limitations."

Appellant's claims for refund not having been filed within the period of statutory limitation are not and cannot be considered as claims for refund duly filed "according to the provisions of law in that regard," and, therefore, by reason of the provisions of § 7422 of the Internal Revenue Code of 1954, 26 U.S.C.A., this action cannot be maintained.[1]

While it is unnecessary for decision here to consider a supposed contention of appellant that the non-payment of the $35,000 purchase price for the motel is a business bad debt, in view of the fact that appellant prosecuted and appeared throughout these proceedings without the aid of counsel, it may be well to point out that such contention has no merit for the reason that such claim was not set forth in a timely filed claim for refund.

> "[1] It is of course the law that a suit for refund of taxes must be based on a claim previously filed with the Commissioner, and that the claim

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[1] § 7422. Civil Actions For Refund

(a) No Suit Prior To Filing Claim For Refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

must set forth in detail each ground on which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." *Rogan v. Ferry,* 9 Cir., 154 F.2d 974, 976.

The judgment of the District Court is affirmed.

(Endorsed) Opinion Filed Aug. 9, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals
For the Ninth Circuit

Carl H. Root, Appellant, vs. United States of America, Appellee.	No. 17,011

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and hereby is affirmed.

(Endorsed) Judgment Filed and Entered August 9, 1961.

Frank H. Schmid, Clerk

RESPONDENT'S BRIEF IN OPPOSITION

Office-Supreme Court, U.S.
FILED
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No. 515

In the Supreme Court of the United States

OCTOBER TERM, 1961

CARL H. ROOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
A. F. PRESCOTT,
NORMAN H. WOLFE,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	3
Conclusion	5
Appendix	6

CITATIONS

Cases:	
Alixon v. *United States*, 344 U.S. 167	3
Real Estate Title Co. v. *United States*, 309 U.S. 13	4
United States v. *Felt & Tarrant Co.*, 283 U.S. 269	4
Statutes:	
Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):	
Sec. 23(e)	3, 6
Sec. 23(k)	2
Sec. 117(d)	2
Sec. 322(b)	4, 6
Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):	
Sec. 166(d)	2
Sec. 1211(b)	2
Sec. 7422(a)	4, 7
Miscellaneous:	
Treasury Regulations 111 (1939 Code):	
Sec. 29.43-2	3, 7
Sec. 29.322-3	4, 8

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No. 515

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OPINIONS BELOW

The order (R. 24–25) of the District Court granting the motion of the United States for summary judgment is not officially reported. The opinion of the Court of Appeals (Pet. i–vi) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1961. (Pet. vii.) The petition for a writ of certiorari was filed on October 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, prior to the commencement of suit, the taxpayer filed timely claims for refund of income taxes on the grounds asserted in this refund suit.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 23 and 322 of the Internal Revenue Code of 1939 and Section 7422 of the Internal Revenue Code of 1954 and Treasury Regulations 111, Sections 29.43–2 and 29.322–3 appear in the Appendix, *infra*, pp. 6–9.

STATEMENT

On October 2, 1950, the taxpayer sold his interest in a motel located near Detroit, Michigan, to a party named Gonek for $35,000 and accepted in payment seven unsecured promissory notes of $5,000 each signed by Gonek. The first of these notes was to mature on October 2, 1951, and one of the others on the same date of each succeeding year through 1957. (R. 3, 18; Pet. ii.)

Within a month after the first note became due and was not paid, the taxpayer discovered that Gonek had sold the motel to a third person, thus terminating whatever equitable claims taxpayer may have had to the motel, and that Gonek had left the Detroit area. The taxpayer subsequently ascertained that Gonek's promissory notes were worthless and was allowed the maximum deduction available to him for a nonbusiness bad debt—in petitioner's case, $1,000[1]—on his

[1] See Sections 23(k)(4) and 117(d)(2) of the 1939 Internal Revenue Code and Sections 166(d)(1) and 1211(b) of the 1954 Internal Revenue Code.

federal income tax returns for each of the years here in issue. (R. 18; Pet. ii–iii.)

On May 13, 1957, the taxpayer filed claims for refund of a part of his income taxes paid for the years 1951 through 1956 on the ground that he was entitled to a theft loss deduction of $5,000 annually as each of Gonek's $5,000 notes matured and was not paid. (R. 9, 12–13; Pet. iii–iv.) The theft loss deductions, if otherwise allowable, would not be subject to the $1,000 limitation. The claimed theft loss had been discovered in 1951 when the taxpayer found that he had been deprived of any interest in the motel without payment. (R. 18; Pet. iv.)[2]

On August 27, 1959, the taxpayer filed letters with the District Court commencing this suit for refund (R. 3–5), and on November 19, 1959, pursuant to the order of the District Court, taxpayer filed an amended complaint (R. 8–9). The District Court granted the motion of the United States for summary judgment on the merits on the ground that taxpayer's claim for refund was not filed within the time limited by the applicable statute. (R. 24–26.) The Court of Appeals affirmed. (Pet. v.)

ARGUMENT

1. Under Section 23(e) of the 1939 Code (Appendix, *infra*, p. 6) both theft and embezzlement losses ordinarily are deductible in the year in which incurred or, in case of concealment, in the year in which the theft is discovered. *Alison* v. *United States*, 344

[2] Although the record does not so indicate, the files of the Internal Revenue Service disclose that the taxpayer was notified that his claims for refund were disallowed on January 29, 1959.

U.S. 167; Treasury Regulations 111, Section 29.43–2 (Appendix, *infra*, pp. 7–8). In the present case the claimed theft loss was discovered in 1951 when taxpayer found that he had been deprived of any interest in the motel without payment, for it was the interest in the motel and not the debt represented by the unpaid notes that was stolen. Taxpayer filed claims for refund on May 13, 1957, more than three years after he could have claimed the theft loss on his 1951 income tax return. Section 322(b) of the 1939 Code (Appendix, *infra*, pp. 6–7) provides that a claim for refund must be filed within three years from the time the return was filed or within two years from the time the tax was paid. As the Court of Appeals held (Pet. v), taxpayer's claims for refund were not filed within the period of statutory limitations and were not "duly filed with the Secretary or his delegate, according to the provisions of law in that regard" and consequently the maintenance of this suit is prohibited by Section 7422(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 7).

2. This Court has held that in a refund suit the taxpayer may not urge any grounds not specified in his claim for refund filed with the Internal Revenue Service. *Real Estate Title Co.* v. *United States*, 309 U.S. 13, 17–18; *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 270, 272–273. See Regulations 111, Section 29.322–3 (Appendix, *infra*, pp. 8–9). The taxpayer's apparent present contention (Pet. 2–3) that the nonpayment of the $35,000 purchase price for the motel is a business bad debt was not set forth in a timely filed claim for refund. The alleged theft loss

is the only ground for refund specified in the taxpayer's claims for refund (R. 12–13), and, as described above, those claims were not filed within the statutory time limit. The admitted facts furnish no support for a contention by taxpayer that he filed a refund claim on any other grounds, and consequently the courts below correctly held that this suit is prohibited by the express terms of Section 7422(a) of the 1954 Code and Section 322(b) of the 1939 Code.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
A. F. PRESCOTT,
NORMAN H. WOLFE,
Attorneys.

NOVEMBER 1961.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. * * *

* * * * — *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless

before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7422.)

Treasury Regulations 111 (1939 Code):

Sec. 29.43-2. *When charges deductible.*—Each year's return, so far as practicable, both as to gross income and deductions therefrom, should be complete in itself, and taxpayers are expected to make every reasonable effort to ascertain the facts necessary to make a correct return. The expenses, liabilities, or deficit of one year cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, and it follows that if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he cannot deduct them from the income of the next or any succeeding year. * * * If subsequent to its occurrence, however, a taxpayer first ascertains the amount of a loss sustained during a prior taxable year which

has not been deducted from gross income, he may render an amended return for such preceding taxable year including such amount of loss in the deductions from gross income and may file a claim for refund of the excess tax paid by reason of the failure to deduct such loss in the original return. (See section 322.) A loss from theft or embezzlement occurring in one year and discovered in another is ordinarily deductible for the year in which sustained.

Sec. 29.322–3 [as amended by T.D. 5325, 1944 Cum. Bull. 152; T.D. 5333, 1944 Cum. Bull. 358; T.D. 5425, 1945 Cum. Bull. 10; T.D. 5680, 1949–1 Cum. Bull. 126, and T.D. 5772, 1950–1 Cum. Bull. 117–118]. *Claims for refund by taxpayers.*—

Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or short Form 1040A, or by the use of Form W–2 (Rev.) or Employee's Optional Form 1040A, or an amended return, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. The statements of the grounds and facts must be under oath or verified by a written declaration that they are made under the penalties of perjury. For taxable years beginning after December 31, 1942, a properly executed return on Form 1040 or short Form 1040A shall, at the election of the taxpayer, constitute a claim for refund or credit within the meaning of section 322 for the

amount of the overpayment disclosed by such return. * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. * * *

* * * * *

The Commissioner has no authority to refund on equitable grounds penalties or other amounts legally collected. As to claims for refund of sums recovered by suit, see sections 29.322–4 to 29.322–6, inclusive.

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